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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JACQUELINE B. REEDY, as Trustee, etc., Plaintiff and Respondent, v. LETANTIA B. BUSSELL, as Trustee, etc., et al., Defendants and Appellants.	G040277 (Super. Ct. Nos. A217505, A218588 & A219334) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert D. Monarch, Marjorie Laird Carter and Mary Fingal Schulte, Judges. Affirmed.

Law Offices of Nate G. Kraut and Nate G. Kraut; Law Offices of William Kermisch and William Kermisch for Defendant and Appellant Todd Bussell.

Meserve, Mumper & Hughes and Bernard A. Leckie; Alan M. Reedy for Plaintiff and Respondent Jacqueline B. Reedy, as Trustee, etc.

Todd Bussell appeals from a judgment entered against him for damages caused by his unauthorized sale of assets belonging to two family trusts. The trial, on remand following a partially successful appeal from an earlier default judgment (*Reedy v. Bussell* (2007) 148 Cal.App.4th 1272), addressed the issue of damages only, as the trial court had imposed issue sanctions which foreclosed Todd[1] from disputing liability. Todd argues the second judgment should be reversed as well, because (1) the initial trial judge, who imposed the issue sanctions, erroneously believed he was obligated by this court to do so; (2) that judge was admittedly biased against him, and the sanctions should consequently have been reconsidered by another judge; (3) he was improperly denied his right to a jury trial; (4) the court erred by excluding the report prepared by Bussell's expert and precluding the expert from testifying about his opinions; (5) the court applied the wrong measure of damages; and (6) the court erred by refusing to grant Bussell's motion for new trial.

FACTS

This probate litigation was initially comprised of five consolidated petitions, each relating to one of three trusts set up to benefit the family of Helen Chamness Bussell. The first trust, set up by Helen's late husband, Elmer, is the Elmer Jacob Bussell Testamentary Trust (the Elmer Trust). The second and third trusts, set up by Helen, are collectively entitled the Helen Chamness Bussell Family Trust. That instrument includes both the Initial Trust, which is revocable, and the Gift Trust, which is irrevocable.

Helen and Elmer's son, John Bussell, was named trustee of both the Elmer Trust and the two trusts created by Helen. However, after John's suicide in February of 2002, Helen and Elmer's daughter, Jacqueline Reedy, was named co-successor of the

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1 There are several people involved in this case who share the last name of Bussell. We consequently refer to these people, including defendant and appellant Todd Bussell, by their first names for the sake of clarity. No disrespect is intended.

Elmer Trust, and successor trustee of the two Helen trusts. In that capacity, Reedy discovered what she believed to be evidence that John had improperly withdrawn money, for his own benefit, from both the Elmer Trust and Helen's revocable Initial Trust.

Consequently, in early 2003, Reedy filed two petitions. The first of those alleged not only misconduct by John in connection with withdrawals from the Initial Trust, but also alleged that Todd Bussell, John's son, had appropriated an access number issued to John as trustee of a brokerage account belonging to the Initial Trust, and improperly used that number to cause the sale of certain stock belonging to the trust. The petition sought recovery against Todd, as well as against his mother, Letantia Bussell.

Reedy's second petition alleged similar misconduct, including improper withdrawals by John, and improper use of the brokerage access number to trade stock by Todd, in connection with the Elmer Trust.

Reedy's third petition, filed in July of 2004, sought instructions from the court, and monetary contribution from trust beneficiaries for losses incurred in connection with ranch property owned by Helen's Gift Trust.

The other two consolidated petitions were filed by Todd. The first of these two, filed on April 8, 2003, had challenged the validity of the sixth amendment to Helen's Family Trust, which was executed by Helen in June of 2002, in the wake of John's death. The second of Todd's petitions, filed in October of 2003, sought to have Reedy removed as trustee of the Gift Trust, alleging she was not eligible to serve under the terms of that trust. This petition also sought damages for various alleged improprieties committed by Reedy in the course of her trusteeship, as well as an accounting and instructions.

The litigation of these consolidated petitions did not go smoothly. Although each side accused the other of failing to properly comply with discovery obligations, Reedy appeared to have a particularly difficult time obtaining compliance

from Letantia and Todd. Reedy filed a series of motions seeking redress for discovery violations, as well as the imposition of increasingly severe sanctions.

The court gave Letantia and Todd repeated warnings and opportunities to comply with their obligations, but they repeatedly failed to do so. Finally, with the trial date looming, Reedy presented the court with a formal noticed motion renewing her prior requests for severe sanctions, including issue, evidentiary and terminating sanctions against both Letantia and Todd, on each of the five petitions, based upon their continuing uncooperative and obstructive behavior, and their noncompliance with discovery obligations and court rules.

At the commencement of trial, the court took the sanction requests under submission, explaining that it intended to evaluate the effect of the discovery abuses, and any prejudice suffered by Reedy, during the course of the trial. Unfortunately, that was not enough of a warning to deter Letantia and Todd from further obstreperous conduct, and at several points thereafter, the court again reminded them rather pointedly that it had taken Reedy's motion for terminating sanctions under submission, and was beginning to see its merit.

Ultimately, with the trial partially completed, the court concluded it had no choice but to grant the motion. The court explained it had given Letantia and Todd the opportunity to proceed at trial, but their performance in that trial, as well as their "inappropriate" attempts at mid-trial discovery, were both factors in its ultimate decision to terminate the case. The court then scheduled the case for what it characterized as a default prove-up. Based upon the evidence adduced at that prove-up, the court entered judgments on each of the five petitions.

Letantia and Todd appealed those judgments, denouncing them on various grounds, but placing particular emphasis on the assertion the court's decision to impose terminating sanctions had been in excess of its powers and an abuse of discretion. We strongly disagreed, noting that "[b]ased upon the record before us, we can only wonder

what took [the trial court] so long." (*Reedy v. Bussell*, *supra*, 148 Cal.App.4th 1272, 1275.)

We concluded however, that one issue raised in the appeal did have merit. Reedy petition cases Nos. A217515 and A219334, alleging that Todd had improperly caused the sale of stock owned by the Initial Trust, and the Elmer Trust (using the access number that had been issued to his late father, John, as trustee), and had not specified the amount of damages caused by those wrongs. Consequently, neither petition provided sufficient notice of the amount in dispute to provide the basis for entry of a default judgment.

Thus, as a result of that prior appeal, we reversed the judgments against Bussell on those two petitions, and remanded the matter to the trial judge who had presided over the earlier trial, with instructions to reconsider the terminating sanctions (i.e., the striking of Bussell's answers) which he had levied in connection with those petitions. But our decision was in no way prompted by a belief the sanctions had been too harsh; on the contrary, we complimented the judge for his remarkable forbearance, noting he "consistently gave [Bussell] the benefit of the doubt, and strongly indulged the policy preference for allowing matters to proceed on their merits." (*Reedy v. Bussell*, *supra*, 148 Cal.App.4th 1272, 1274.)

We thus instructed the court on remand to "reconsider whether more limited issue sanctions, relating to liability only, would be appropriate, and for further proceedings in accordance with that decision." (*Reedy v. Bussell*, *supra*, 148 Cal.App.4th 1272, 1294.)

The case was then remanded to the trial court, and specifically to the same judge, who had presided over the earlier trial, the Honorable Robert D. Monarch. A hearing date was set for July 19, 2007. At that hearing, Judge Monarch explained to the parties that in his view, the issue of liability had long since been resolved, and that in accordance with the direction contained in our opinion, he was "disposed to proceed . . .

on the issue of damages only." When Todd objected to contest any inference this court's opinion had "directed" any specific result on the sanction issue, and argued a formal hearing and briefing schedule should be set to determine the issue, the court made clear its understanding that our opinion gave it "the latitude that the law provides" to determine the appropriate relief. The court then explicitly stated it had "engaged in a reconsideration" of the sanction issue – which included a review of both the sanction motions brought in connection with the earlier trial and "the manner in which the trial was conducted" – and concluded it was "appropriate that the matter proceed based upon the issue [of] damages only."

Todd then inquired whether the damages would be limited to the "adverse tax effect of the alleged stock sale," and the court replied "I am not expecting that there is going to be any claim for damages different than what was claimed at the default proceeding." Reedy then indicated that expectation was correct, but clarified that "[w]e are claiming interest."

After some discussion about the amount of discovery Todd intended to conduct, as well as the issue of expert witnesses, the court adopted Todd's suggestion and selected October 9, 2007, as the date for commencement of the damages trial. Todd waived notice of that date, and made no mention of a request for jury trial.

On July 23, 2007, Todd filed an ex parte application for an order that the damages trial be conducted before a jury as trier of fact. He argued he had demanded a jury in connection with the first trial, and such a demand must be treated as "continuing" for purposes of subsequent proceedings after remand. He acknowledged the requested jury had been denied in the earlier trial, but argued the "gist" of the case had changed on remand, and must now be viewed as merely an action for damages based upon trespass.

Reedy opposed the ex parte request, noting that Todd's demand for a jury trial in connection with the first trial had been denied, and asserting that the case still involved the internal affairs of a trust, and thus no jury trial was available. She also

pointed out that Todd had waived any right to a jury in the upcoming damages trial, by failing to request one at the July 19, 2007 trial setting conference. Despite that opposition, the court granted the motion for a jury trial.

Shortly thereafter, Reedy filed an ex parte application for reconsideration of the jury trial order. At the hearing on that ex parte, the court indicated an inclination to reverse its order granting a jury trial, noting that its initial decision may have been based in part on a determination that simply giving Todd the jury trial he sought might prevent him from pursuing a further appeal. As the judge acknowledged "I might have been exercising my discretion to save judicial resources and time and money . . . ." However, rather than ruling that day, the court invited Todd to file further points and authorities on the issue. The court explained it would issue a final decision on the jury trial issue on August 20, 2007, when the parties would reconvene for a hearing on Todd's motion to dismiss one of the petitions.

At the August 20, 2007 hearing, Judge Monarch informed Reedy that Todd had filed a motion to disqualify him pursuant to Code of Civil Procedure section 170.6, and offered her time to research whether such a petition was timely and appropriate at that juncture in the proceedings. The court then continued the other matters scheduled for that date, pending a determination on the disqualification.

However, rather than allow the disqualification motion to proceed, Judge Monarch chose instead to issue a sua sponte order that same day, recusing himself from further participation in the case. As the order explained, Judge Monarch, had "regrettably concluded" he must recuse himself pursuant to Code of Civil Procedure section 170.1, subdivisions (a)(6)(i) and (ii), as he had "developed a negative perception" of the attorney representing Todd, based upon an array of conduct occurring both before the earlier appeal and after we had remanded the case. The judge stated plainly that he had come to question counsel's "exercise of legal judgment," and believed there was substantial doubt as to whether he could remain impartial in the context of the upcoming damages trial.

The judge also expressed the hope that Todd and his counsel might have more faith in another judge, thus promoting finality in the matter.

In the wake of Judge Monarch's self-recusal, Todd made a motion to set aside the prior decision to limit the upcoming trial to damages only, alleging the decision had been tainted by the judge's admitted bias, and requested that the issue be reconsidered by another judge. The motion was denied by a new judge, Marjorie Laird Carter.

And because Judge Monarch never actually ruled on Reedy's motion for reconsideration of his prior order granting Todd's request for a jury trial, she renewed that motion before the new judge as well. She pointed out, as she had before, that Todd's ex parte application had been brought at a time when her lead counsel was unavailable, and also pointed out additional facts which she contended made the requested jury trial inappropriate. Among other things, she pointed to a minute order dated March 30, 2005, which reflected the parties' waiver of a jury in connection with the prior trial, and also to the fact Todd had failed to challenge on appeal the denial of a jury in connection with that prior trial. The motion for reconsideration was granted, and the court issued an order once again denying the requested jury trial.

Meanwhile, on August 6, 2007, Reedy served a demand for exchange of expert witness information, setting August 31, 2007, as the date for exchange. However, Todd did not comply with the request to exchange information on the specified date. Instead he simply mailed a declaration which did not comply with the statutory requirements for exchange, and which was received by Reedy after the deadline.

In October of 2007, the court set a trial date of December 18, 2007, and Reedy served on Todd a notice requiring him to appear at the trial and produce documents pursuant to Code of Civil Procedure section 1987, subdivision (b). However, Todd filed objections to the notice, and Reedy consequently filed a motion for a court order requiring Todd to personally appear at trial. The court granted the motion.

On December 14, 2007, the parties filed several documents in connection with the pending trial, including trial briefs and a joint stipulation of facts. On that same date, Reedy served a motion in limine to exclude expert testimony on Todd's behalf, on the grounds he had materially failed to comply with the statutory requirements for expert witness disclosure, and had failed to make his expert available for a timely deposition.

The joint stipulation of facts provided, among other things, that John Bussell had died on February 5, 2002, and that he was both the trustee of the Helen Chamness Bussell Family Trust, and a cotrustee of the Elmer Trust, at the time of his death. The stipulation further provided that: on February 12, 2002, 4,000 shares of Kinder Morgan stock held by the Initial Trust were sold, causing the Initial Trust to realize a taxable gain of $117,757; on February 12, 2002, 2,000 shares of Lowe's Corporation stock held by the Initial Trust were sold, causing the Initial Trust to realize taxable gains of $109,863; and due to the gains realized from those stock sales, the Initial Trust had a taxable gain of $227,637, resulting in federal capital gains tax liability of $45,435, and California income tax liability of $19,295.

The stipulation further provided that: on or about February 12, 2002, 20,000 shares of Lowe's Corporation stock held by the Elmer Trust were sold, causing the trust to realize a long-term capital gain of $1,097,441, and resulting in a tax liability of $294,516. Reedy, who was the successor trustee of the Initial Trust, and successor cotrustee of the Elmer Trust in the wake of John's death, did not authorize any of the stock sales.

The trial date was continued to January 3, 2008. In violation of the court's order, Todd did not appear. Instead, his counsel presented the court with a letter from a psychologist, purporting to explain why Todd should be excused from attending for medical reasons. In response, Reedy requested entry of Todd's default. The court took that motion, as well as Reedy's motion in limine to exclude Todd's expert witness evidence under submission, and began the trial.

Reedy's expert witness, Anthony Aulisio, Jr., testified concerning his calculation of damages suffered by the trusts as a result of the unauthorized sale of the stocks held by each. Reedy also testified, explaining she had not learned of the stock sales until sometime between April and August of 2002, when she obtained statements detailing the transactions from the broker. Reedy agreed that somewhere between September and November of 2002, she had purchased 10,000 shares of Lowe's stock for the Elmer Trust, and that the trust had paid a lower price per share than what it had received for the 20,000 shares sold in the unauthorized trade back in February of 2002 but did not recall any decision to replace any of the stock that had been sold. She explained that the decision to purchase the 10,000 shares "was an investment decision, period." She could not recall whether it would have been possible for the Elmer Trust to purchase 20,000 shares of Lowe's at that time.

The court then returned to the motions it had taken under submission. Todd's counsel acknowledged he had not served Reedy with any expert witness report until the morning of December 18, 2007, when trial was set to commence. Counsel also acknowledged that Todd had failed to serve any declaration under penalty of perjury stating that he did not possess any of any documents requested by Reedy, until he moved for reconsideration of the order compelling his appearance at trial and his production of the documents. The court then noted it was acutely aware of our prior opinion reversing the earlier default judgment, and that it consequently felt constrained from simply entering Todd's default in the damages trial. However, the court also believed that the letter submitted by Todd's counsel to excuse his attendance a trial was "woefully inadequate" and "we can't just let him off the hook," so it decided to impose "issue sanctions relating to damages." Specifically, the court precluded Todd from offering any "defense testimony or evidence or argument relating to the items" Todd had been requested to produce at trial.

With respect to the issue of expert testimony, the court found that Todd's act of mailing his expert witness declaration on the date designated for exchange rendered it timely, and thus concluded it would be inappropriate to exclude the expert entirely. However, the court also noted that Todd did not serve Reedy with the expert's initial report until the date set for trial – more than three months after the date for exchange of expert witness information. And in response to the court's inquiry, Todd's counsel acknowledged that the report had not even been prepared until the day before. The court then ruled the report would not come into evidence.

After Todd's expert, Jack White, began testifying, he revealed he had not actually been retained as of August 31, 2007, when he was formally designated as Todd's expert. He acknowledged that he would not have formed any opinions as of that time, and would not have been prepared to give a deposition. White's retention was finalized sometime in November of 2007, and he first reviewed the stipulated facts, as well as the report of Reedy's expert, in mid-December of 2007. White had no ability to form any opinions until he received those documents, and did not actually form the opinions he was prepared to testify about until December 17, 2007, the day before the then-scheduled trial.

Based upon White's testimony, Reedy once again moved that his opinions be disallowed. Reedy pointed out that White was never able to participate in a meaningful deposition at any point during the time she had sought to schedule one, and that Todd's counsel had even rebuffed her efforts to do so in late November of 2007 – claiming it was too late – despite the fact that at that point, White *had yet to form any opinions*. This time the court agreed, likening this behavior to what both Todd and Letantia had engaged in during the prior trial.

Consequently, the court ordered that White's own opinions would be excluded from the trial, and that he would be allowed to testify only to rebut the opinions which had been offered by Aulisio.

At the conclusion of evidence, the court took the matter under submission. On January 30, 2008, the court issued its ruling: "As in the earlier trial before another judge, this Court strongly indulged the policy preference for allowing matters to proceed on their merits. But, this indulgence must be counter-balanced with the need to insure fairness in the proceedings and the equally strong public policy for enforcing court orders. In short, this Court did not see the [appellate court's] direction to conduct a trial (as to damages) on the merits as immunizing respondent from the consequences of conduct occurring *after* the February 2007 opinion became final.

"The Court denied the petitioner's motion in limine to bar Jack White, respondent's expert, from testifying. The Court found at trial that Todd Bussell timely mailed his response to the demand to exchange expert witness information. The response itself left a lot to be desired, as it failed to designate an hourly or daily rate for deposition, and it failed to disclose whether there were any discoverable reports. Petitioner's counsel did not notice the expert's deposition. Instead, he did what most professionals would do: he inquired of the opposing side as to available dates for the expert. The opposing counsel waited two weeks to respond, and then advised Mr. Leckie that the time had passed for taking the expert's deposition. He reiterated this position in a later letter, declaring it a "moot" issue.

"During the expert's testimony, the Court (and apparently petitioner's counsel) learned that although Mr. White had been designated on August 31, 2007, he was not prepared to give a meaningful deposition until days before the trial. He did not finish his report until December 17, the day before trial (which later trailed to January 2, 2008), *and his report was not provided to Mr. Leckie until the day of trial.* This was over 3 and a half months past the date of designation. As it also turned out, Mr. White had not even been formally retained as of the date he was designated, nor had he reviewed anything related to the case. The fact he agreed over the phone to be listed as an expert, before he had any idea what his opinions would be, casts serious doubt on his credibility

as a witness in this case. Mr. Leckie had produced his expert's report (later amended to show a decrease in the original figure of damages calculated) on the original date of designation. . . . Accordingly, the Court issued an order barring admission of the report, and barring the expert from referring to it, or stating its contents. There are reasons for the expert designation statutes, one of them being to encourage disclosure far enough in advance of trial to allow the parties to prepare for trial. What the respondent did was not in keeping with the spirit of the expert disclosure [statutes].

"Mr. Leckie had a very good case for excluding Mr. White from testifying altogether, but in an abundance of caution, the Court allowed him to at least comment on Mr. Aulisio's report.

"For reasons more fully stated on the record, the Court also denied the petitioner's motion in limine "to strike all opposition of Todd Bussell on the issue of damages and for entry of his default" due to his failure to appear at trial, per the December 5, 2007, order of Judge Carter. The Court did impose evidentiary sanctions, as stated on the record. There was no excuse for the failure to appear, and perhaps a contempt citation would have been in order. The letter from the psychologist ("Declaration of Linda Trozzolino in support of Respondent Todd Bussell") was woefully inadequate, not to mention hearsay and was not subject to cross-examination. She apparently also wrote to Judge Carter informing the judge she had "professionally advised" Bussell not to appear at the trial. The Court rejected counsel's offer to inform the Court in camera, of the nature to Mr. Bussell's disability, as an ex parte communication outside of Mr. Leckie's presence. It appears default may already have been entered (after remand) by Judge Monarch, but again, in an abundance of caution, the Court allowed counsel for respondent to participate in the case, albeit with the constraints imposed by the evidentiary rulings.

"In the 2005 trial, Judge Monarch struck Bussell's answer. There is no answer or response on file. Thus, there is no affirmative defense of mitigation of

damages, as was argued for at trial. And, in any event, there was insufficient evidence adduced at trial to support the argument that the petitioner failed to mitigate her damages.

"The Court accepted as true all the facts submitted in the Joint Stipulation of Facts (filed December 14, 2007). Based on the evidence submitted, the Court finds in favor of petitioner.

"Petitioner is awarded judgment against Todd Bussell in the amounts set forth at page 5 of the 12/28/07 report of Mr. Aulisio (Exhibit 13):

"$825,649.96 as to the Elmer Trust; $114,198.20 as to the Initial Trust, together with all costs of suit. Mr. Aulisio's analysis was well reasoned, and supported by the preponderance of the evidence. Mr. White's criticisms did not persuade the Court."

I

Todd's first argument is that after our remand, Judge Monarch's decision to impose an issue sanction which foreclosed further litigation of liability, and allowed the trial to proceed on damages only, was the product of an erroneous belief this court had mandated that result in our prior opinion. We are not persuaded.

First, we must note, as Todd points out, that our opinion did not require the court to impose any particular sanctions on remand. Instead, we expressly directed the court to "*reconsider whether* more limited issue sanctions, relating to liability only, would be appropriate . . . ." (*Reedy v. Bussell, supra*, 148 Cal.App.4th 1272, 1295, italics added.) Thus, if we thought the court had simply imposed issue sanctions on remand in the belief that it had been required by us to do so, we would agree that the matter should be remanded again with instructions that the court should exercise its discretion. But we cannot conclude that is what occurred.

We start with the presumption that the court acted properly and in accordance with our instruction to reconsider the sanction issue. Only if the record cannot reasonably be reconciled with that presumption do we abandon it and conclude

the court erred. (*Mejia v. City of Los Angeles* (2007) 156 Cal.App.4th 151, 158, ["We presume that the court properly applied the law and acted within its discretion unless the appellant affirmatively shows otherwise.]".) And here, the record presents no such compelling case. The statements made by the court, and relied upon by Todd, do not establish that the court believed itself *without power* to reconsider sanctions. The statements suggest at most that Judge Monarch simply believed his prior decision, to impose the most draconian sanction, had been vindicated on appeal, and there was consequently no *need* to engage in a wholesale reexamination of whether imposition of the most severe type of sanction was warranted. Thus, when the judge said "it seems that the issue of liability has long since been resolved through the court," we presume the court he was referring to was his own. His prior order, striking Todd's answers to the two petitions as a sanction, had necessarily included a decision to preclude him from contesting liability. It appears Judge Monarch simply saw no reason to depart from that view on remand.

And ultimately, Judge Monarch made clear he had followed our direction on remand by engaging in what he expressly referred to as a "reconsideration" of the sanction issue, prior to conducting the hearing at which he announced his decision to the parties. As the judge explained, once the case had been returned to him, he engaged in a review of the file pertaining to the earlier sanction decision, including specifically the motions in limine which had led up to that decision; he considered again "the manner in which the [prior] trial was conducted;" and he then freshly concluded it would be "appropriate that the matter proceed based upon the issue [of] damages only." That is exactly what we expected would be done, and we find no error in it.

II

Todd next argues that in the wake of Judge Monarch's decision to recuse himself, his bias against Todd must be presumed to have existed, and consequently the

court should have granted reconsideration of Judge Monarch's decision to impose issue sanctions limiting the trial to issues of damages only. Again, we disagree.

There is nothing in Judge Monarch's frank admission of possible bias, and consequent decision to recuse himself, that suggests he would not have been similarly frank about that issue at an earlier point in the proceedings. As Judge Monarch explained in his order, the events contributing to his adverse opinion of Todd's then-counsel had occurred both before *and after* the remand following our prior opinion. Thus, the order suggests that Judge Monarch's negative opinion of counsel was something that had developed over time, and that the most recent events described may have qualified as the proverbial "straw that broke the camel's back." We decline to speculate, based upon no evidence at all, that the court had harbored improper bias against Todd and his counsel at any point prior to the date the court recused itself.

Moreover, as we specifically noted in our prior opinion, the record suggests, if anything, that Judge Monarch had an established pattern of giving Todd the benefit of the doubt in these proceedings, and had done everything he could to avoid imposing the severe sanctions warranted by Todd's repeated misconduct.

And in the wake of that appeal, there were only two decisions of any substance issued by Judge Monarch, neither of which suggests even a hint of bias. The first was Judge Monarch's order imposing the modified sanctions which limited the trial to issues relating to damages. In doing so, Judge Monarch was actually scaling back the terminating sanction he had imposed prior to the last appeal – a sanction we approved of in principle – and providing Todd an opportunity for a contested trial. Because he did so in essentially the exact manner we had suggested might be appropriate, we certainly could not conclude that order might constitute a basis for inferring the existence of bias against Todd at that point.

The second substantive decision made by Judge Monarch was his initial order granting Todd's request for a jury trial. Of course, Todd won that one, but what is

more significant about the ruling is Judge Monarch's suggestion, during the hearing on Reedy's motion for reconsideration, that his decision in Todd's favor *might have been colored by the belief that caving in to Todd's demands on procedural matters might be the most efficient means of finally bringing this case to a close*. In other words, the judge was acknowledging that he might have been giving Todd an undeserved win, simply to avoid further conflict down the line.

No wonder Judge Monarch chose to recuse himself from the case that same day. Based upon his comments, it appears his real concern may have been that his low opinion of Todd's then-counsel might actually lead him to make rulings adverse *to Reedy*.

At most, then, the record before us suggests to the extent the court's poor impression of Todd's counsel had any effect on its rulings prior to the date of recusal, that effect was beneficial, rather than detrimental, to Todd. There is simply no evidence suggesting Judge Monarch had allowed any then-unacknowledged feelings of bias to affect his rulings in a manner adverse to Todd's interests. We consequently reject Todd's assertion Judge Monarch's admission of possible bias, and consequent self-recusal from further participation in the case, necessarily implies his *earlier* rulings against Todd – including his imposition of issue sanctions following remand – were tainted. And we conclude the court did not err in refusing to grant reconsideration of that sanction order.

III

Todd next asserts the judgment must be reversed because the court erred in refusing to grant his request for a jury trial. According to Todd's argument, the petitions against him alleged nothing other than a civil claim for damages based on trespass, a legal rather than equitable claim, and thus he was entitled to a trial by jury.

Reedy counters by citing Probate Code section 17006, which provides that "there is no right to a jury trial in proceedings under this division concerning the internal affairs of trusts.," She notes that Probate Code section 17200, subdivision (b)(12)

specifically defines "[p]roceedings concerning the internal affairs of a trust" as including those "[c]ompelling redress of a breach of the trust by any available remedy." We think Reedy has the better of these arguments, and agree with the trial court's conclusion that the allegations against Todd concern "the internal affairs of trusts."

As Todd apparently concedes, if he were a trustee, claims asserted against him based upon the manner in which he had conducted trust business would fall within the ambit of "internal affairs." He notes that Probate Code section 16400 defines a "breach of trust" as "[a] violation by the trustee of any duty that the trustee owes the beneficiary . . . ." Todd believes that because he never held the position of trustee, the claims against him cannot qualify as a "breach of trust" and must be treated like any other dispute between a trust and some unrelated third party. We cannot agree.

First, we must note that Probate Code section 16400 is not exclusive. While it does specify that a violation of a trustee's duty is a "breach of trust," it does not state that no other category of misconduct could qualify as such a breach.

But second, and more significant for our purposes, even assuming that misconduct by a trustee were the only category of acts which would qualify as a "breach of trust," the actions for which Todd was being held responsible in this damages trial would fall within that category. To be clear, Todd's liability was not in dispute. We must therefore presume for purposes of assessing the nature of the claim that he actually committed the acts alleged in the petitions; i.e., that he utilized access numbers which had been issued to his late father John, as a trustee of the two trusts, to cause the sale of assets belonging to those trusts. In doing those acts, Todd was, quite literally, *assuming his father's role as trustee* and *conducting trust business.*

This is not a case involving allegations that some third party stole funds from a trust for his own benefit, or involving a business dispute between a third party and a trust. If the brokerage house which handled the trusts' accounts had filed suit for unpaid commissions on the stock transactions at issue here, we would agree that such a

suit does not fall within the ambit of the trust's "*internal* affairs." But what Todd did here was insert himself into the role of trustee – albeit improperly – and cause the trusts to carry out brokerage transactions. In causing the sale of shares owned by the trusts, Todd was acting as an insider – he placed himself squarely into the "internal" workings of the trusts.

And having usurped the role of trustee for the purpose of making business decisions on behalf of the trusts, Todd cannot now disclaim that role in asserting his right to a jury trial. The fact Todd acted *improperly* in assuming the powers of a trustee cannot be twisted into a basis for conferring upon him a jury trial right that an actual trustee would not have had. The court did not err in denying Todd's jury trial request.

Moreover, even assuming Todd had been entitled to request a jury in this probate matter, Code of Civil Procedure section 631, subdivision (d) sets forth the various means by which the right to a jury trial may be waived: "(d) A party waives trial by jury in any of the following ways: [¶] (1) By failing to appear at the trial. [¶] (2) By written consent filed with the clerk or judge. [¶] (3) By oral consent, in open court, entered in the minutes. [¶] (4) *By failing to announce that a jury is required, at the time the cause is first set for trial, if it is set upon notice or stipulation, or within five days after notice of setting if it is set without notice or stipulation.* [¶] (5) By failing to deposit with the clerk, or judge, advance jury fees as provided in subdivision (b) .[¶] (6) By failing to deposit with the clerk or judge, at the beginning of the second and each succeeding day's session, the sum provided in subdivision (c)." (Italics added.)

In this case, it is undisputed that Todd did not request a jury when the case was first set for trial following the remand. That constituted a waiver, and the court was not obligated to relieve Todd of it when he later moved ex parte for an order setting the matter for a jury trial.

Todd asserts his failure to demand a jury at the trial setting conference is immaterial, since he had demanded a jury way back before the prior trial in this case, and

that demand must be deemed "continuing," for the duration of the proceeding, such that he is not required to restate it at any point. (See *Hoffman v. Southern Pacific Co.* (1929) 101 Cal.App. 218.) But that assertion is unpersuasive. The record contains evidence, reflected in a court minute order, that the parties had all "waived" a jury in connection with that prior trial. While Todd disputes the accuracy of that minute order, his dispute is immaterial at this point. The minute order exists, and constitutes substantial evidence of waiver.

And finally, even assuming Todd never waived his jury trial demand during the proceedings leading up to the last trial, the record demonstrates he did waive the issue on appeal. Even if the record could be read to indicate that in contravention of his demand, Todd was denied a jury in connection with the prior trial, on appeal he failed to challenge that denial. His failure to address that issue on appeal does not result in law of the case – that only occurs when a necessary issue is actually addressed on appeal (see *Gunn v. Mariners Church, Inc.* (2008) 167 Cal.App.4th 206, 213), but it does amount to a waiver of the alleged error (the denial of his jury trial demand) and means he cannot continue to rely on *that demand* as a basis for claiming a right to jury trial now.

IV

Todd next contends the court erred in excluding from evidence the reports and testimony of his expert witness. Again, we cannot agree. Essentially, Todd argues the court exceeded its jurisdiction in rejecting his expert's report, because Code of Civil Procedure section 2034.300 allows for such a sanction only when the opposing party has "made a complete and timely compliance" with its own expert witness discovery obligations under Code of Civil Procedure section 2034.270. Todd claims that Reedy did not make a "complete and timely compliance" herself, because while she served her initial expert report in a timely fashion, she thereafter served revised versions of the report after the initial deadline.

But Code of Civil Procedure section 2034.270 does not prohibit a party from revising its initial expert witness report. It requires only that each party "produce and exchange, at the place and on the date specified in the demand, all discoverable reports and writings, if any, made by any designated expert described in subdivision (b) of [Code of Civil Procedure] Section 2034.210." As Todd concedes, Reedy did that. If Todd had any objections to the content of revised reports thereafter served by Reedy, he could have raised those objections before the trial court. He did not, however, choosing instead simply to criticize Reedy for doing so as a means of deflecting the well-deserved criticism heaped upon him after his expert acknowledged in testimony that Todd had made no effort at all to comply with either the letter or the spirit of the expert witness discovery statutes.

Todd also contends the court erred in citing to Rule 450 of the Local Rules of Orange County, in chastising him for his woeful compliance with pre-trial obligations. He notes that Reedy's motion in limine had not relied upon the local rules, and the court could not impose sanctions based upon their violation absent notice and an opportunity to be heard. (Super. Ct. Orange County, Local Rules, rule 454.) But we cannot accept Todd's basic premise that the court had rejected the statutory bases for sanctions set forth in Reedy's motion in limine.

While the court noted in the minute order explaining its decision Todd's failure to list his expert report on his exhibit list, and had failed to exchange a copy of it at the issues conference (both violations of local rules), that was hardly the primary basis for its decision to impose sanctions. The minute order also describes, in some detail, Todd's conduct in violation of the statutory requirements for exchange of expert witness information – including the fact his expert was not prepared to give a meaningful deposition prior to trial, and did not prepare a report until the day before trial.

Moreover, the reporter's transcript reveals that, just as Judge Monarch had done in connection with the prior trial, this court initially gave Todd the benefit of the

doubt, and hesitated to conclude the worst about him. Thus, the court's initial thinking was that (1) Todd had technically complied with the basic requirement to exchange expert witness information in a timely fashion; and (2) because Reedy had merely written a letter seeking dates for a deposition – which Todd ignored – rather than unilaterally choosing a date and serving a notice of deposition, Todd had not technically "refused" to produce his expert. However, the court's impression of Todd's behavior changed markedly upon hearing the expert explain the circumstances surrounding his retention and the formation of his opinions.

Once the court realized that Todd had not even retained the expert as of the time he designated him, did not bother so much as to send the man a document until long after the time had passed for taking his deposition (all the while deflecting Reedy's attempts to schedule it), and that the expert did not even *form* an opinion until the day before the case was scheduled for trial, the court concluded Todd's effort to appear in compliance with Code of Civil Procedure section 2034 was "a sham," and characterized Todd's course of conduct as "not fair and . . . not in keeping with the sprit of the Discovery Act." The record in this case provides no basis to infer, as Todd would have us do, that the court believed Todd had complied with his *statutory* requirements, and then sanctioned him only for violations of local rules, without notice or any opportunity to be heard. It appears the court sanctioned him for *all* the rules he broke.

Finally, Todd suggests the imposition of harsh sanctions against him based upon his failure to comply with the requirement of expert witness discovery was an abuse of discretion, since Reedy's compliance was also imperfect. Todd believes the court's failure to sanction Reedy at all for her service of revised versions of Aulisio's report, while sanctioning him so severely for his lapses, constitutes "disparate treatment." The contention is wholly unpersuasive. A critical element missing from Todd's argument is any authority for the proposition that Reedy acted improperly in revising her initial expert witness report, let alone any demonstration of what might have been an appropriate

remedy for such impropriety. Also missing is any evidence he made any objections to Reedy's revised reports, or that he requested the court take some action relating to them.

In the complete absence of any showing that Reedy violated any rule, that Todd objected to such violation in a timely fashion, and that the court took (or failed to take) some action in response, we simply cannot compare that situation to what actually occurred here. What we can do is note that a party who made virtually no effort to comply with the statutory requirements governing expert witnesses, who did not bother to formally retain his expert until months after he "designated" that expert in response to the opposing party's demand, who deflected the opposing party's efforts to schedule an expert deposition, and did not even provide the purported expert with the information *to form an opinion* until the eve of trial, should not be surprised when the court treats him the same as a party who did not designate an expert. We discern no abuse of discretion here.

V

Todd's penultimate argument is that the court erred by failing to apply the proper measure of damages. The argument has several parts. Todd first asserts the court was required to apply the "avoidable consequences doctrine," otherwise referred to as a plaintiff's duty to mitigate damages. As Todd explains it, the doctrine specifies that a plaintiff is prohibited from recovering damages that "could have been avoided with reasonable effort and without undue risk."

The trial court's decision reflects that it rejected this argument for two reasons: first, because "[i]n the 2005 trial, Judge Monarch struck [Todd's] answer. There is no answer or response on file. Thus, there is no affirmative defense of mitigation of damages, as was argued for at trial;" and second, because "there was insufficient evidence adduced at trial to support the argument the petitioner failed to mitigate her damages."

The first point, that Todd's answers had previously been stricken, would not justify the refusal to consider the issue of mitigation at the damages trial after remand. To the extent Todd's answers had been stricken, as a discovery sanction, before the prior appeal in this case, it was the absence of those answers – amounting to the default – which led inevitably to the default *judgments* which we subsequently reversed. Our reversal was based on our determination it had been inappropriate for the court to enter a judgment based on a default – and more specifically to have placed Todd in default – in a situation in which the complaints had not specified the amount of damages sought, and thus no default *judgments* could be obtained.

Because the default judgments could not be allowed to stand, we remanded the case to the trial court with directions to consider some lesser sanction – meaning something alternative to the prior order striking Todd's answers and causing his defaults – which might allow for a trial on damages only. Thus, as a result of our opinion, if Todd's answers had been previously stricken the means of effectuating the court's sanction, those answers were revived.

However, it is not clear from our record whether Judge Monarch actually struck Todd's answers. According to the motions in limine requesting entry of Todd's and Letantia's defaults in case Nos. A219334 and A217515, neither Todd nor Letantia had filed answers to the amended petitions as of March of 2005, when the defaults were initially requested. The judgment entered on the basis of those defaults offers no meaningful answers, as it merely notes that "the imposition of terminating sanctions struck all responses and answers filed or claimed to have been filed by . . . Todd Bussell . . . ." And our record in this appeal includes no copies of any such answers filed or claimed to have been filed by Todd. As a consequence, we have no information as to whether Todd attempted to file answers which were rejected, actually filed answers, or simply ignored the entire pleading issue.

All of which leaves us with the critical, yet unanswerable, question of whether Todd ever affirmatively pleaded the duty to mitigate as a defense – because if he didn't, the issue actually was waived without regard to what evidence may have been adduced at trial. (*Baruh v. Kuhl* (1963) 213 Cal.App.2d 266, 273.) As Todd has the burden of establishing error on appeal, his failure to include any pleadings demonstrating he actually raised the affirmative defense in this case is sufficient to doom his claim. "'The burden of affirmatively demonstrating error is on the appellant. This is a general principle of appellate practice as well as an ingredient of the constitutional doctrine of reversible error.' [Citation.] The order of the lower court is '"presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness."' [Citation.]" (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610.)

That having been said, however, the second point made by the court – that there was insufficient evidence presented at trial to justify a finding Reedy failed to act reasonably to avoid the damages caused by Todd's misconduct – is both a proper basis for finding against Todd on that issue, and supported by the record herein.

Essentially, Todd's argument is that the fact Reedy did purchase 10,000 other shares of Lowe's stock for the Elmer Trust, after becoming aware of Todd's unauthorized sale – and at a lower price than Todd had sold the stock for – necessarily qualifies as an act of mitigation. He further suggests that Reedy could have replaced all of the Lowe's stock for that lower price, and was obligated to do so as a means of mitigating damages.

Again, we do not agree. As Reedy points out, her decision to purchase some Lowe's stock in the wake of Todd's unauthorized sale of similar shares would not constitute an act of mitigation, unless the evidence demonstrated that Reedy had purchased those shares for the specific purpose of mitigating the effect of Todd's actions *and would not otherwise have done so.* After all the supply of stock available for purchase in a publicly traded company is, for all practical purposes, unlimited, and if

Reedy believed the lowered price for a particular company's shares made them an attractive investment at any given point, and otherwise had funds available to make the purchase, she would presumably have made it without regard to what other assets were owned by the trusts.

Significantly, this is not a case in which the trusts *needed* particular shares of stock, such that Todd's unauthorized sale would have required the trusts to repurchase them in some specific amount. Nor would Reedy's purchase of the same type of stock that Todd had sold do anything to mitigate the capital gains tax consequences triggered by that earlier sale. The stock is simply not fungible in that way.

Thus, Reedy had no duty to repurchase the same stock, even if available at some point for a lower price, to replace the shares lost by Todd. Her only duty was to make reasonable investment choices for the trusts on a going forward basis, given the information and resources available to her at any given point.

Moreover, as Todd seems to concede, Reedy's duty to avoid the consequences of his misconduct does not materially alter the analysis. That duty requires only that she make reasonable efforts, without undertaking undue risk – in other words, that she continue to make prudent investment choices on behalf of the trusts. And significantly, because the duty is a matter of affirmative defense, the burden was on Todd to establish that Reedy *failed to do something* that reason and prudence would have required under the circumstances existing in the wake of his improper trades.

He simply failed to do that. There is no evidence in the record before us as to the specific circumstances in existence with each trust in the wake of Todd's misconduct – let alone any evidence demonstrating that a reasonable person would have done anything different than Reedy did to mitigate its deleterious effects. While it is true that the price of Lowe's stock went down in the wake of Todd's trades, that fact alone does not establish that any reasonable person would have purchased at least as much of the stock as he had sold – after all, stock is volatile, and the price might have continued to

go lower, rather than back up. It is thus nearly impossible to conclude (except in hindsight) that Reedy "should" have done anything different than she did, and consequently the court did not err in rejecting Todd's failure to mitigate the claim.

Todd also contends that each component of the ultimate damage award, including: (1) the capital gains tax incurred and paid as a result of his trades; (2) the prejudgment interest on the capital gains tax paid; (3) the appreciation in the value of the stocks; and (4) the dividends that would have been paid, were improper and the court erred in allowing them.

With respect to the capital gains tax, Todd asserts that his sale of stocks belonging to the trusts qualifies as the "loss or destruction of personal property," and suggests that the measure of damages applicable to such a loss is limited to "the value of the property at the time of such loss or destruction." (Citing *Pelletier v. Eisenberg* (1986) 177 Cal.App.3d 558, 567.) The assertion is unpersuasive. *Pelletier* involved the destruction of artwork, and has nothing to do with the stocks at issue herein – which were sold, rather than "lost" or "destroyed."

Civil Code section 3333 provides that the general measure of damages in a tort case is "the amount which will compensate for *all the detriment proximately caused thereby*, whether it could have been anticipated or not." (Italics added.) And Todd fails to offer any authority suggesting that tax liability should not be considered a proximate result of the sale of a long-term asset. In the absence of such authority, we will not presume the court erred.

Todd next argues that prejudgment interest on the amount of tax liability should not have been awarded, because Civil Code section 3287 provides for an award of such interest only where the damages were "certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day . . . ." Todd's first argument is that the liability was not capable of being made certain because of the dispute regarding whether Reedy could have mitigated her damages. However, as

we have already explained, Todd failed to sustain his burden of establishing that Reedy did not act reasonably in this case, and thus he has lost that dispute.

Todd also asserts that the tax liability incurred by the Elmer Trust cannot be considered certain, because Reedy's expert provided two different calculations of the net liability, one "adjusted" to reflect the possible mitigating effect of "other securities . . . sold at a loss during 2002, in an apparent attempt to mitigate the capital gains incurred on the Lowe's stock." But the expert's calculation of two different amounts does not render either calculation "uncertain;" instead, it reflects two "certain" alternatives – one or the other of which the court can apply depending upon whether it chooses to treat the sale of those other assets as a mitigating factor. As Todd concedes, the existence of alternative damage calculations, depending upon which legal theory the court adopts, does not preclude an award of prejudgment interest. (See *Olson v. Cory* (1983) 35 Cal.3d 390, 402 ["Generally, the certainty required of Civil Code section 3287, subdivision (a), is absent when the amounts due turn on disputed facts, but not when the dispute is confined to the rules governing liability."].)

Todd also contends the court erred in awarding Reedy (1) the difference between the prices received by the trusts for the stocks when he sold them, and the market prices of the stocks at the time of trial; and (2) the dividends that would have been paid on the stocks during the intervening period. He contends the award of these damages was improper because Reedy could have repurchased the stocks at some point after he sold them (and in fact, did purchase 10,000 shares of Lowe's stock in the wake of his sales), and her failure to do so was unreasonable. (*Strebel v. Brenlar Investments, Inc.* (2006) 135 Cal.App.4th 740, 753, fn. 14 ["[A]t some point the failure to reinvest may well become unreasonable. At that point the chain of causation would be broken and the loss of additional appreciation would be attributable to the plaintiff's decision not to reinvest."].) This is essentially the same argument Todd asserted, and we rejected, in connection with Reedy's duty to mitigate.

Once again, Todd has failed to cite any evidence demonstrating that Reedy's conduct was *unreasonable* at any particular point. There was certainly no evidence from any investment expert, opining that a reasonably prudent investor would have done anything different than Reedy did under the circumstances present in this case. To the contrary, Todd's entire argument is based upon the bare assertion that the types of stock he chose to sell remained on the market and were thus *available* for Reedy to repurchase at a later date. That mere assertion of availability not only ignores the volatility of the market, but falls far short of demonstrating that Reedy *could* have repurchased them at any particular point (i.e., that the trusts had the financial ability to do so), or *should* have. Because Todd failed to establish that Reedy's failure to "reinvest" in the stocks he sold became "unreasonable" at any point following his unauthorized sale, the court did not err in awarding her, as an element of damages, the difference between the price for which Todd sold the shares and their value at the time of trial, and the dividends which would have been earned by the trusts in the interim.

VI

Todd's final argument is that the court erred in denying his motion for a new trial. This assertion is essentially a reiteration of his earlier claim that the court abused its discretion, and subjected him to "disparate treatment," because it excluded his expert witness evidence from the trial, while at the same time ignoring the fact that Reedy's expert witness report had been revised twice in the weeks following the initial date set for exchange of expert witness information. Todd contends the court was "mistaken in its assumption (implicit in its ruling) that Todd was not prejudiced by the late production of the final report . . . ."

We have already concluded the court did not abuse its discretion in the resolution of the expert witness matter. Todd neither objected to Reedy's revisions of her expert witness report in a timely fashion, nor provided the court with any authority for the proposition that Reedy had acted inproperly in making the revisions. Nor did Todd

offer, in support of his motion for new trial, any *evidence* demonstrating he had actually been prejudiced by the "late production of the final report." In his *argument*, Todd suggests that the late production was prejudicial because by the time it was served on him it was "too late for [him] to notice a deposition of Aulisio concerning all of the new items of damages." But there is no evidence reflecting that he made any attempt to schedule such a deposition upon receipt of the final report, or that he would have taken it had he been given the opportunity to do so.

In the absence of any evidence demonstrating Todd was somehow unfairly thwarted in his efforts to complete expert witness discovery prior to trial, we cannot fault the trial court for its "implicit" assumption that he was not. We discern no error in the court's denial of Todd's motion for new trial.

The judgment is affirmed. Respondent shall recover her costs on appeal.

BEDSWORTH, J.

WE CONCUR:

SILLS, P. J.

FYBEL, J.